Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1585

RICHARD HENSON AND HENSON AVIATION, INC.,
Petitioners,

vs.

T. S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 392 F. Supp. 813 (D.Md. 1975) and is set forth at Appendix A of the Petition. The first opinion of the Court of Appeals for the Fourth Circuit is reported at 538 F.2d 85 (4th Cir. 1976) and is set forth at Appendix B of the Petition. A second opinion, withdrawing in part the prior opinion, has not yet been officially reported but is set forth at Appendix C of the Petition. An Order was entered by the Court of Appeals on April 5, 1977 making certain changes in said opinion (Appendix D of the Petition). Finally, and subsequent to the filing of the Petition herein, another Order was entered May 20, 1977 correcting a typographical error in the April 5, 1977 Order (Appendix A, *infra.*).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. On September 30, 1976, the effective date of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, (hereinafter the "H-S-R Act"), was this action "pending" before the Fourth Circuit Court of Appeals within the meaning of *Bradley* v. *Richmond School Board*, 416 U.S. 696, 710 (1974)?

2. If so, did the application of the H-S-R Act by the Court of Appeals to award an attorney's fee in this case result in "manifest injustice" to Henson, the Petitioner herein?

3. Did the Court of Appeals err in awarding an attorney's fee, pursuant to the H-S-R Act, to an antitrust plaintiff who obtained the very same injunctive relief prayed for in his complaint?

STATUTE INVOLVED

The pertinent provisions of Section 16 of the Clayton Act (15 U.S.C. § 26), as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Public Law 94-435) are set forth in the Petition at page 3.

COUNTER-STATEMENT OF THE CASE

For more than 40 years defendants Richard Henson and Henson Aviation, Inc. ("Henson") have been the sole suppliers of a full range of aviation services (a "fixed base operation" or "fbo") at the Hagerstown Regional Airport, Hagerstown, Md. The airport is owned by the City of Hagerstown. Henson also acted as "airport manager," a practice which the District Court found to be the "usual practice" for cities throughout the United States the size of Hagerstown (or somewhat larger). In that capacity, Henson negotiated with potential competitors of the Henson fbo the terms of leases of facilities and the scope of competition with the Henson fbo.

Plaintiff, T. S. Alphin, d/b/a Alphin Aircraft ("Alphin"), an aircraft mechanic who at times operated his business out of the basement and garage of his home, has provided aircraft maintenance and repair work for users of the airport since 1948, earning a very modest living from such work.[1] In 1972, Alphin sought to expand his operation and to enter into broader competition with Henson by offering to sell fuel, oil and other services to airport patrons. Henson, purporting to be acting on behalf of the City of Hagerstown, sought to impose upon Alphin, and other potential competitors, restrictions which the District Court, sitting without a jury, found "would have handicapped if not prevented Alphin and the others from effectively competing with [Henson] and were intended by

[1] The District Court found that from 1968 through 1972 Alphin earned a net profit from this business ranging from $6,638 to $15,332 annually.

Henson to have such effect." Thus, the District Court concluded that Henson had gone "beyond the limits permitted by the antitrust laws" and found that Henson had attempted to monopolize the market in violation of Section 2 of the Sherman Act, entering appropriate injunctive relief.[2] Henson did not appeal this finding or result.

On the other hand, the District Court found that Alphin had not established a "pecuniary loss" flowing from Henson's unlawful action, 392 F. Supp. at 830, and therefore declined to award damages pursuant to Section 4 of the Clayton Act. Alphin did not appeal this finding or result.

As to Alphin's right to be awarded a reasonable attorney's fee, the District Court ruled, as a matter of law, that where no damages were awarded to an antitrust plaintiff a reasonable attorney's fee "may not" be allowed under Section 4 of the Clayton Act. And, despite its prior finding that Henson had the specific and unlawful intent to monopolize the market and to "handicap if not prevent" Alphin from effectively competing with him, the District Court made no findings as to whether such an intent brought into play the "bad faith—oppressive conduct" exception to the "American Rule" (that each party bear the cost of his own attorney) which was specifically recognized by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975).

Alphin appealed to the United States Court of Appeals for the Fourth Circuit, limiting his appeal to the ruling of the District Court regarding the award of a reasonable attorney's fee. In an opinion dated May 17, 1976, the Court of Appeals affirmed, citing dictum in the case of *Byram Concretetanks, Inc.* v. *Warren Concrete Products Co. of N.J.*, 374 F.2d 649 (3d Cir. 1967), for the conclusion that "[t]he failure of the plaintiffs to

[2] Alphin's Complaint in this case (Appendix B, *infra.*) sought treble damages and a "permanent injunction against the threatened loss and damage by defendants' violation of the antitrust laws." The injunctive relief entered by the Court (Appendix C, *infra.*) did precisely that.

prevail upon their claim for damages *precluded* any recovery for attorneys' fees under Section 4. . . ." (emphasis added), and ruling that this Court's opinion in *Alyeska, supra, "foreclosed"* (emphasis added) the award of an attorney's fee under the "bad faith—oppressive conduct" exception to the "American Rule."

After his Petition for Rehearing was denied on June 15, 1976, Alphin immediately moved to stay the issuance of the Court of Appeals' Mandate, stating his intention to seek a Writ of Certiorari from the Supreme Court. In response to Alphin's Motion, the Court of Appeals entered, on June 25, 1976, an Order staying the issuance of its mandate "pending application of the appellant in the Supreme Court of the United States for a Writ of Certiorari to this Court, provided the application is filed within the time permitted by law." (Appendix D, *infra.*).

On August 16, 1976, within the time permitted by law, Alphin filed a Petition for Writ of Certiorari to which a Supplement was filed on October 28, 1976. The Supplement brought to the attention of this Court the enactment, on September 30, 1976, of Public Law 94-435, known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976. This Court denied the Petition without comment on November 15, 1976, and on the same day Alphin served a "Motion for Leave to File a Petition for Rehearing" and a "Motion for Stay of Mandate" pending consideration of the aforesaid "Motion for Leave to File a Petition for Rehearing."[3]

On November 19, 1976 the Court of Appeals granted the motion for a further stay of its mandate "until the petition for rehearing is decided" and gave Henson full opportunity to file a response to the petition and to brief the issues raised therein. Henson availed himself of this opportunity and his response was filed on November 24, 1976.

[3] The Court of Appeals received formal notice of the denial of Alphin's Petition for a Writ of Certiorari on November 22, 1976.

On February 22, 1977, the Court of Appeals granted Alphin leave to file the petition for rehearing and withdrew that portion of their prior opinion which affirmed the denial of attorney's fees. Instead, the Fourth Circuit reversed the District Court's judgment in that regard and remanded "the case with directions to grant appropriate attorney's fees in accordance with the 1976 Act." In a dissenting opinion, Judge Field argued that the Act could not be given retrospective application in that the Court's prior decision "had become a finality . . . four months prior to the effective date of the Amendment."[4]

Henson then filed a Petition for Rehearing *en banc* and a Motion for Stay of Mandate, both of which were denied by the Court of Appeals. The Court of Appeals thereafter issued its mandate to the District Court which was filed in the District Court on May 16, 1977.

ARGUMENT

Stripped to its relevant essentials,[5] the Petition seeks this Court's review of three aspects of these proceedings in the Court of Appeals: first, Henson claims that the Court of Appeals lacked *jurisdiction* to apply the H-S-R Act in this case, since it had already rendered one opinion; second, that even if the Court of Appeals did have jurisdiction over the case when it

[4] The text of the Court of Appeals' February 22, 1977 opinion has been reprinted in the Petition as Appendix C and the Court's April 5, 1977 Order modifying that opinion was reprinted in the Petition as Appendix D. Subsequent to the filing of the Petition, on May 20, 1977, the Court issued an Order correcting a typographical error in its April 5 Order. This cleared up the confusion expressed by Henson in the Petition (at pp. 6-7). To simplify matters, we have corrected the February 22 opinion in the manner specified by the two subsequent Orders and have reprinted it, as corrected, at Appendix E, *infra*.

[5] Except to note that Henson's statement that "the trial court expressly found that the subject private antitrust action was brought solely in quest of an attorney's fee" (Pet. p. 2) is absolutely false (the trial court made *no* such "finding"), we shall not directly address the gratuitous insults of this nature found in Henson's Petition.

issued its February 22, 1977 opinion, the *Bradley* v. *Richmond School Board, supra,* doctrine was not applicable since its operation resulted, according to Henson, in "manifest injustice" to himself; and, third, that even if the *Bradley* doctrine was properly relied upon by the Court of Appeals, the H-S-R Act itself was misapplied by the Court since, according to Henson, the Court was wrong when it ruled that Alphin was "clearly" entitled to an attorney's fee under the H-S-R Act. None of these issues are substantial enough to warrant review by this Court.

I. The Jurisdiction of the Court of Appeals over this Case Was Not Lost When it Rendered its First Opinion

That an appellate court has the power to modify or change an opinion until its mandate issues, and in exceptional cases, even by recalling its mandate after it issues, is plain. Rehearings, rehearings *en banc*, and other proceedings which may modify, reverse or clarify a previously rendered appellate decision, while not common, are surely not extraordinary. Henson, however, argues that the Court of Appeals, having once rendered an opinion, is "precluded" from changing that opinion in light of legislation which became effective after that opinion was rendered. The logical result of this theory would be that if the H-S-R Act had become effective on the day after the Court's first opinion was entered, May 17, 1976, the Court of Appeals would have had no power to give effect to the new law in any subsequent, revised or modified opinion on rehearing. What Henson fails to recognize is that the February 22, 1977 opinion of the Court *was* a "decision" and, by giving full effect to the Act, followed precisely the doctrine enunciated in *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801) and followed in *Bradley, supra, i.e.*, that any "decision" by an Appellate Court must apply existing legislation "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley, supra* at p. 711. This is not a proposition that needs to be reiterated again by this Court in this case.

At the bottom of Henson's complaint in this regard is simply the fact that the mandate of the Court of Appeals had not yet issued at the time the Court received Alphin's second Petition for Rehearing. Henson claims that on two occasions the Court of Appeals "ignored" Rule 41(b) of the Federal Rules of Appellate Procedure by the Stays of Mandate issued on June 25, 1976 and November 19, 1976 and that, since the Federal Rules of Appellate Procedure are "obligatory and must be literally followed", the decision of the Court of Appeals must be reversed by this Court. In response, we respectfully direct the Court's attention to Rule 2 of the Federal Rules of Appellate Procedure:

> Rule 2. *Suspension of Rules.*
> In the interest of expediting decision, or for other good cause shown, a Court of Appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction (Fed.R.App.P. 2).[6]

It is obvious that the Court of Appeals acted within its legitimate powers by staying the issuance of its mandate as it did.

Indeed, this Court's opinion in the *Bradley* case clearly separated cases of this sort into two categories: on the one hand are cases where a new statute becomes effective *before* a "final judgment," and, on the other hand, are cases where a collateral

[6] Rule 26(b) specifically permits enlargements of time to be granted by a Court of Appeals *except* for five types of actions specifically described therein, but not including a Stay of Mandate. Moreover, it ill becomes Henson to castigate the Court of Appeals for its actions in this regard when Henson *never raised any objection* to Alphin's Motions for the Stays of Mandate nor to the stays as issued by the Court until after the Court's ruling went against Henson. It is also interesting to note that, while decrying the action of the Court of Appeals in granting Alphin a stay of mandate for more than 30 days (Pet. p. 15), Henson himself, on April 7, 1977, moved for a stay of mandate "for *at least* thirty days."

attack based upon new legislation is made upon a case *after* final judgment. *Bradley, supra*, at 710-11. The instant case, like *Bradley*, falls into the first category. When does "final judgment" occur? The *Bradley* opinion expressly ruled at p. 711 n.14: "By final judgment we mean one where the 'availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed." On September 30, 1976 this case had *not* reached "final judgment" by that standard.

II. The Decision of the Court of Appeals Applied the Tests for "Manifest Injustice" and Arrived at a Conclusion Consistent With Decisions of this Court

The Court of Appeals cited *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974)[7] for the general rule that courts are to give effect to new laws in cases pending before them unless "manifest injustice" would result or unless the legislative history indicated to the contrary.[8]

In determining "manifest injustice," this Court in *Bradley* looked to adverse effects upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights before allowing retrospective application of a statute. The Fourth Circuit, in a concise fashion, considered all of these criteria in turn and found that such application was in order.

With regard to the nature and identity of the parties, this Court in *United States* v. *Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801) declared that in "mere private cases" the courts should struggle against retrospective operation of statutes. In *Bradley*, "mere private cases" were found not to include those suits brought to vindicate "a national policy of

[7] The *Bradley* case involved an award of attorney's fees pursuant to a statute enacted after the attorneys' services were rendered and after the case was submitted on appeal.

[8] The legislative history of the H-S-R Act so plainly and forcefully indicates that Congress *intended* it to be applied to pending cases that we need not review that history here and simply refer this Court to the discussion of that point in the opinion of the Court of Appeals.

high priority" or having to do with "great national concerns," 416 U.S. at 719 n.27. Antitrust enforcement is clearly such a "great national concern."

It is generally held that strong private enforcement of the antitrust laws is of great importance both to injured parties and to the nation as a whole. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Radovich* v. *National Football League*, 353 U.S. 445 (1957). In *United States* v. *Topco Associates*, 405 U.S. 596, 610 (1972), the antitrust laws were described as follows:

> They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

The market involved here is small, and the parties are not listed on the Big Board, but the Congressional purpose has been achieved nevertheless by a successful prosecution which resulted in a finding that the Sherman Act had been violated and an injunction issued against future violations. The Court of Appeals took cognizance of the importance of the nature of Alphin's suit by characterizing it as a vindication of "the public interest and public policy expressed in the antitrust laws." Clearly this is more than a "mere private case"; it is a successful attempt to compel greater competition between Henson and all those adversely affected by Henson's illegal attempt to monopolize.

Bradley's second test, that of the "nature of [the parties'] rights" turned upon whether retrospective application would "infringe any rights . . . which had matured or become unconditional." Looking at the effect upon Henson, the Court of Appeals expressly held that no such matured or unconditional rights would be affected and, in his Petition, Henson does not claim otherwise.[9]

[9] Strangely, the discussion of this point in the Petition focuses upon whether *Alphin* had any "rights" that were affected by retrospective application of the H-S-R Act. (Pet. at p. 12).

The third concern, under the *Bradley* decision, deals with the affected party having had "notice and opportunity to be heard," 416 U.S. at 720. The retrospective application of the H-S-R Act was briefed by Alphin both in the Supplement to his Petition for Writ of Certiorari and in his Petition for Rehearing. Although Henson chose not to file a response to Alphin's Supplemental Petition, Henson did brief the H-S-R Act in his response in opposition to Alphin's Petition for Rehearing. In fact, Henson devoted over half of his own Petition for Rehearing to an argument on the inapplicability of the H-S-R Act.[10] It is difficult for us to comprehend how Henson can now argue that he has not been given adequate opportunity to be heard. Additionally, as the Court of Appeals pointed out, since attorney's fees have been the only issue throughout this appeal, "lack of notice" is a frivolous argument.

Therefore, contrary to Henson's assertions, the Court of Appeals correctly applied the tests for "manifest injustice" from *Bradley* and appropriately determined that it did not exist in this case.

III. The Decision of the Court of Appeals Evidenced Due Regard for the "Substantially Prevailed" Requirement in the H-S-R Act

As enacted, the H-S-R Act amends Section 16 of the Clayton Act, 15 U.S.C. § 26, as follows:

> In any action *under this section* in which the plaintiff substantially prevails, the court shall award the costs of suit, including a reasonable attorney's fee, to such plaintiff. (emphasis added.)

In his Petition, Henson has accused the Court of Appeals of making "no finding as to which party substantially prevailed" in the District Court and therefore asks this Court to remand the case for a "direct finding" on that issue. To the

[10] The Court of Appeals denied Henson's Petition for Rehearing on April 5, 1977.

contrary, the Court of Appeals affirmatively found that Alphin "clearly would have been entitled to an award of attorneys' fees supplementing the injunctive relief which [was] granted." It is submitted that this conclusion is the "finding" that has eluded Henson.

In support of the Court of Appeals' conclusion, it is useful to look at the injunctive relief that Alphin requested in his Complaint and the injunctive relief granted by the District Court. The Complaint prayed for a "permanent injunction against the threatened loss and damage by defendant's violation of the antitrust laws." On April 7, 1975, the District Court entered its judgment granting Alphin an injuction against Henson which

> . . . restrained and enjoined [Henson] from attempting to monopolize any part of the business they or either of them now conduct on the Hagerstown Regional Airport under their existing lease by negotiating on behalf of the City of Hagerstown, as airport manager or otherwise, or by using the position of airport manager in an effort to prevent others from establishing competitive operations, or *in any other way that would violate § 2 of the Sherman Act, 15 U.S.C. 2.* (emphasis added.)

By any manner of comparison, viewing the relief granted against the relief requested "clearly" indicates that Alphin has "substantially prevailed" in his suit for injunctive relief under Section 16 of the Clayton Act. It is obvious that a wide range of anticompetitive behavior on Henson's part, beyond acting as negotiator, was enjoined by the Court. In fact, any behavior by Henson in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, renders Henson subject to civil contempt of court proceedings and we fail to see what a remand to the District Court for a "direct finding" could accomplish.[11]

[11] At p. 12 of the Petition, Henson says that the District Judge "would not" have granted any injunctive relief to Alphin had he known that it would cause an attorney's fee to be awarded to Alphin. We cannot believe that a Federal District Court would refuse to enjoin unlawful conduct just because an attorney's fee would result.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A. Order dated May 20, 1977 of Court of Appeals Modifying Opinion dated February 22, 1977

APPENDIX B. Complaint

APPENDIX C. Injunction Entered by District Court dated April 7, 1975

APPENDIX D. Order of Court of Appeals Staying Mandate dated June 25, 1976

APPENDIX E. Corrected Opinion of Court of Appeals dated February 22, 1977

APPENDIX A

United States Court of Appeals

FOURTH CIRCUIT

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Re: No. 75-1635, T. S. Alphin, etc. vs. Richard Henson, et al
(C/A 73-449-T)

Gentlemen:

Enclosed is a certified copy of the order of April 5, 1977 which contains one correction in line three of the second paragraph. Page 7 has been changed to page 4.

Sincerely yours,

WILLIAM K. SLATE, II

By CAROL R. LEMON

(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL/cfw

Enclosure

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1635

T.S. ALPHIN AND ALPHIN AIRCRAFT, INC.,
Appellants,

v.

RICHARD HENSON AND HENSON AVIATION, INC., AND CITY OF HAGERSTOWN, MARYLAND,
Appellees.

ORDER

Richard Henson and Henson Aviation, Inc. have joined in a petition for rehearing with a suggestion for rehearing in banc. The petition has been read and considered. A majority of the panel has voted to deny rehearing. Upon a request for a poll on the suggestion for rehearing in banc, a majority of the judges eligible to vote have voted to deny rehearing in banc.

It is, therefore, ORDERED that the petition for rehearing be, and it is hereby, denied. It is further ORDERED that the last sentence beginning on page 4 of the text of the slip opinion be stricken and the following inserted in lieu thereof: "Although it has been found that plaintiffs were among those adversely affected by defendants' illegal attempt to monopolize, plaintiffs have been denied any recovery for damages."

For the Court:

HARRISON L. WINTER

Harrison L. Winter,
United States Circuit Judge

A True Copy Teste,
William K. Slate, II, Clerk

By C. F. WILLIAMS
Deputy Clerk

APPENDIX B

United States District Court

FOR THE DISTRICT OF MARYLAND

T. S. ALPHIN, d/b/a ALPHIN AIRCRAFT
Plaintiff
v.
RICHARD HENSON
HENSON AVIATION, INC.
Defendants

Civil Action No. 73-449-T

COMPLAINT

1. Plaintiff is T. S. Alphin, d/b/a Alphin Aircraft, 2613 Pennsylvania Avenue, Hagerstown, Maryland.

2. Defendant Richard A. Henson resides in Hagerstown, Maryland. Defendant Henson Aviation, Inc. is doing business at Hagerstown Municipal Airport, Hagerstown, Maryland.

3. This is an action arising under the antitrust laws, 15 U.S.C. 2, 15 U.S.C. 15 and 15 U.S.C. 26. This court has jurisdiction under 28 U.S.C. 1337 and has venue under 28 U.S.C. 1391.

4. Defendants have monopolized, attempted to monopolize and conspired with each other and with other persons to monopolize trade and commerce in supplying and servicing aviation products and services in interstate commerce at Hagerstown Municipal Airport, Hagerstown, Maryland.

5. Defendants have unlawfully controlled entry of competitive enterprises on and at the Hagerstown Municipal Airport and set prices for services on the said airport.

6. Defendants have unlawfully required plaintiff to pay and collect fees and charges on a different and more onerous basis than defendants charge and collect fees and charges for services rendered to customers on and at said airport to the great competitive disadvantage of plaintiff.

7. Defendants have excluded, and are excluding, enterprises, including plaintiff's, from competing with the services rendered by defendants. Defendants have refused and are refusing to permit plaintiff to engage in business activities in competition with defendants' business activities on the said airport.

8. Defendants have demanded of plaintiff onerous and discriminatory fees and charges which place an unreasonable burden on plaintiff's ability to do business on and at the said airport.

9. Defendants have threatened and are threatening to close off plaintiff's access to said airport and thereby deny plaintiff's customers access to the facilities of plaintiff located adjacent to said airport, which has caused and is causing, and will in the immediate future cause plaintiff great and irreparable damage and loss.

10. Within the past four years, the unlawful activities of defendants and each of them have damaged plaintiff in the amount of $400,000.

11. The unlawful conduct of defendants and each of them, in violation of the antitrust laws, threaten irreparable loss and damage to plaintiff.

Plaintiff prays:

(a) For threefold the damages sustained by plaintiff, and the cost of suit, including a reasonable attorney's fee.

(b) For a preliminary and permanent injunction against the threatened loss and damage by defendants' violation of the antitrust laws.

(c) For such other relief as may be appropriate.

Respectfully submitted

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APPENDIX C

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

T. S. ALPHIN and ALPHIN AIRCRAFT, INC. v. RICHARD HENSON and HENSON AVIATION, INC. and CITY OF HAGERSTOWN, MARYLAND	CIVIL NO. 73-449-T

JUDGMENT

The Court having heard the evidence and argument of the parties and having issued findings and conclusions in an opinion dated March 14, 1975, hereby enters judgment this 7th of April, 1975, as follows:

1. Based upon Conclusions 1 through 8 in that opinion, which are made a part of this judgment,

A. The defendants, Richard Henson and Henson Aviation, Inc., are hereby restrained and enjoined from attempting to monopolize any part of the business they or either of them now conduct on the Hagerstown Regional Airport under their existing lease, by negotiating on behalf

of the City of Hagerstown, as airport manager or otherwise, or by using the position of airport manager in an effort to prevent others from establishing competitive operations, or in any other way that would violate § 2 of the Sherman Act, 15 U.S.C. 2.

B. The defendant, City of Hagerstown, and its officials are hereby restrained and enjoined from permitting Richard Henson or Henson Aviation, Inc., to negotiate on behalf of the City with persons seeking leases or contracts permitting them to engage in activities on the Hagerstown Regional Airport which would compete with those engaged in by Richard Henson, Henson Aviation, Inc., or any other corporation in which Richard Henson is an officer or a stockholder.

2. The claim of plaintiffs, T. S. Alphin and Alphin Aircraft, Inc., for damages against defendants Richard Henson and Henson Aviation, Inc., is denied.

3. The claim of plaintiffs, T. S. Alphin and Alphin Aircraft, Inc., for attorney's fees is denied.

4. Judgment is entered in favor of the counterclaim defendants, T. S. Alphin and Alphin Aircrafts, Inc., on the counterclaims filed by the counterclaim plaintiffs, Richard Henson and Henson Aviation, Inc.

5. Plaintiffs, T. S. Alphin and Alphin Aircraft, Inc., shall recover their taxable costs against Richard Henson and Henson Aviation, Inc. The amount of such costs shall be determined by further order of this Court, if the parties are unable to agree.

6. Richard Henson, Henson Aviation, Inc., and the City of Hagerstown shall each bear his or its own costs.

/s/ ROSZEL C. THOMSEN

Senior United States District Judge

APPENDIX D

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1635

T. S. Alphin, d/b/a Alphin Aircraft,

Appellants,

versus

Richard Henson and Henson Aviation, Inc.,

Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore

Upon motion of the appellant, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by law.

A True Copy, Teste:

William K. Slate, II, Clerk

By /s/ E. BEETON

Deputy Clerk

For the Court—by Direction

/s/ WILLIAM K. SLATE, II

CLERK

APPENDIX E

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1635

T. S. Alphin and Alphin Aircraft, Inc.,
Appellants,

v.

Richard Henson and Henson Aviation, Inc.,
and City of Hagerstown, Maryland,
Appellees.

On Petition for Rehearing.

Submitted November 24, 1976. Decided February 22, 1977.

Before WINTER, Circuit Judge, FIELD, Senior Circuit Judge, and MERHIGE,* District Judge.

Carl W. Schwarz, (Metzger, Noble, Schwarz and Kempler; Robert M. Beckman, Frank Kingston Smith; Beckman and Smith on brief) for Appellants; George J. Goldsborough, Jr., and (Broughton M. Earnest on brief) for Appellees Richard Henson and Henson Aviation, Inc.; (Robert E. Kuczynski, Daniel W. Moylan and William P. Nairn on brief) for Appellee The City of Hagerstown.

* Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

In a previous appeal we affirmed the district court's ruling that defendants, Richard Henson and Henson Aviation, Inc., had attempted to monopolize the business they conducted at the Hagerstown (Maryland) Regional Airport in violation of § 2 of the Sherman Act and that plaintiffs were entitled to injunctive relief. Because plaintiffs could not prove damages as a result of these defendants' attempt to monopolize, we affirmed the district court's ruling that on the authority of *Byram Concretanks, Inc.* v. *Warren Concrete Prod. Co. of N.J.*, 374 F.2d 649, 651 (3 Cir. 1967), plaintiffs could not recover attorneys' fees from these defendants pursuant to § 4 of the Act. Our opinion is reported in 538 F.2d 85 (4 Cir. 1976).

By order entered June 25, 1976, we stayed the issuance of our mandate to permit plaintiffs to apply for a writ of certiorari from the Supreme Court. The petition was filed in the Supreme Court on August 16, 1976. It was eventually denied on November 15, 1976. Notice of denial was received by us on November 22, 1976. In the interim, plaintiffs, on November 17, 1976, filed a motion for leave to file a second petition for rehearing. We entered a further stay of our mandate on November 19, 1976 until the matter could be decided, and directed Henson and Henson Aviation, Inc. to file an answer thereto. The answer was filed on November 24, 1976, and the matter is ripe for decision.

Plaintiffs' latest motion calls attention to the enactment of Public Law 94-435, known as the "Hart-Scott-Rodino Antitrust Improvements Act of 1976," which, *inter alia*, added to the language of 15 U.S.C. § 26 the following:

> In any action under this section in which the plaintiff substantially prevails, the court shall award the costs of suit, including a reasonable attorney's fee, to such plaintiff.

The Act was signed by the President on September 30, 1976, and the quoted language became effective on that date.

The significance of the amendment to the plaintiffs is at once apparent when it is recognized that the injunction against these defendants was entered pursuant to the authority vested in the district court by 15 U.S.C. § 26.[1] Thus, had the 1976 amendment been in effect at the time of decision by the district court, plaintiffs clearly would have been entitled to an award of attorneys' fees supplementing the injunctive relief which they were granted.

It is an established principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974).[2] In the instant case, we do not think that an award of attorneys' fees would result in manifest injustice. Plaintiffs, small aircraft maintenance and repair operators, have successfully vindicated the public interest and public policy expressed in the antitrust laws by bringing would-be monopolists to heel. Although it has been found that plaintiffs were among those adversely affected by defendants' illegal attempt to monopolize,* plaintiffs have been denied any recovery for damages. Retrospective application of the 1976 Act would not, in our view, infringe any right of defendants which had matured or become unconditional; nor have defendants been denied the opportunity to be heard. Indeed, the subject of plaintiffs' claim to attorneys' fees has been the subject of litigation throughout. *See Bradley* v. *Richmond School Board*, 416 U.S. at 717-21. Finally, the 1976 Act, so far as

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[1] While the antitrust violation which defendants committed was an attempt to monopolize proscribed by § 2 of the Sherman Act, 15 U.S.C. § 2, § 16 of the Clayton Act, 15 U.S.C. § 26, is the statute empowering a court of the United States to grant injunctive relief against threatened loss or damage by a violation of the "antitrust laws." "Antitrust laws" is defined by § 1 of the Clayton Act, 15 U.S.C. § 12, to include the Sherman Act.

[2] It is of special interest that Bradley was a case involving an award of attorneys' fees pursuant to a statute enacted after the attorneys' services were rendered and after the case was submitted, but not yet decided, on appeal. The statute was held applicable and counsel fees ordered to be awarded.

[* Per order filed April 5, 1977.]

pertinent, contains no limitation prohibiting its application to the present suit. The legislative history of the 1976 Act indicates that it was intended to apply.[3]

Our control over a judgment of our court continues until our mandate has issued, *Gradsky* v. *United States*, 376 F.2d 993 (5 Cir. 1967); *Meredith* v. *Fair*, 306 F.2d 374 (5 Cir. 1962), unless, of course, our control has been ousted by proceedings in the Supreme Court. Indeed, in exceptional cases, we may even recall our mandate to avoid injustice. *Perkins* v. *Standard Oil Co. of California*, 487 F.2d 672 (9 Cir. 1973); *Powers* v. *Bethlehem Steel Corp.*, 483 F.2d 963 (1 Cir. 1973).

In the instant case, our mandate has not issued as a result of successive stays. We disagree with defendants that Rule 41(b), F.R.A.P., required that our mandate issue on November 15, 1976, the date that the Supreme Court denied certiorari. Read in the full context of Rule 41(b),[4] we think that the

[3] During the Senate debates, Senator Abourezk asked Senator Hart (the moving force behind the legislation):

> Does this mean that following the usual rule, as in such cases as *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974), actions brought prior to the date of enactment of this provision, yet decided after the date of enactment, will still be eligible for such attorneys' fees awards?
>
> MR. PHILIP A. HART. The answer is "yes," under that case and a number of other comparable cases.

Cong. Rec. S8960 (daily ed. June 10, 1976) (94th Cong., 2d Sess.)

[4] With emphasis supplied to the sentence relied on by plaintiffs, Rule 41(b) reads:

> (b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. *Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately.* A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

"filing of a copy of an order of the Supreme Court, etc." refers to the filing in our court and not the original filing in the Supreme Court.[5] While the filing in our court occurred on November 22, 1976, we had already stayed issuance of our mandate by order filed November 19, 1976.

Thus, we conclude that our decision is not final and that we should amend what we previously decided to make it conform to the law which now exists.[6] We therefore grant leave to file the second petition for rehearing; we grant the petition for rehearing; and we withdraw the portion of our prior opinion affirming the denial of attorneys' fees. Instead, we reverse that portion of the district court's judgment and remand the case with directions to grant appropriate attorneys' fees in accordance with the 1976 Act. So that the case is not unduly fragmented, the district court shall make an allowance for attorneys' fees for services in this court and in the Supreme Court, as well as for services in the district court. Plaintiffs shall recover costs since they have ultimately prevailed on appellate review.

AFFIRMED IN PART;
REVERSED IN PART;
AND REMANDED.

[5] Rule 1, F.R.A.P., states that the rules govern procedures in the United States Courts of Appeals. Since the Supreme Court does not issue a mandate when certiorari is denied, the issuance of the mandate is by a Court of Appeals. This indicates that the filing is with the court issuing the mandate. Additionally, the filing in the Supreme Court would not be of a "copy"; it would be the original order denying certiorari.

[6] Defendants contend that plaintiffs sought to bring the 1976 Act to the attention of the Supreme Court and that since the Supreme Court denied certiorari, it necessarily rejected the argument that the 1976 Act was applicable. We are not persuaded. The law is clear that the denial of certiorari decides nothing except that the writ will not be granted for reasons which are undisclosed.

FIELD, Senior Circuit Judge, dissenting:

As noted by the majority, in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), the Court stated "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." On May 17, 1976, we did just that when we filed our opinion in this case denying an award of attorneys' fees.[1] Thereafter we stayed our mandate to permit the plaintiffs to apply for a writ of certiorari, and on September 30, 1976, and while the petition for certiorari was pending, Public Law 94-435, amending 15 U.S.C. § 26, became effective. Certiorari was denied by the Supreme Court on November 15, 1976.

The majority, drawing primarily on *Bradley*, concludes that since our mandate had not issued[2] our decision in this case is not final and that we should therefore give the plaintiffs the benefit of the Amendment. In my opinion the rationale of *Bradley* is inapplicable to this case. In *Bradley* the statute had become effective while the case was pending in this court and had not yet been decided. In the present case, however, the case had been decided by us and had become a finality in this court over four months prior to the effective date of the Amendment. While I agree, of course, that the denial of certiorari has little or no decisional or precedential effect, nevertheless, it occurs to me that the Supreme Court would have been as perceptive as we in discerning any effect of the Amendment on this case. In my opinion the majority has intruded upon the legislative area in giving the Amendment retroactive effect.

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[1] *Alphin* v. *Henson*, 528 F.2d 85 (4 Cir. 1976).

[2] Rule 41(b), Fed.R.App.P., provides, *inter alia*, that "[u]pon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately." Since our mandate was initially stayed for the limited purpose of permitting the plaintiffs to file their petition for certiorari, I entertain serious doubts that our action in ordering a further stay after certiorari had been denied was consonant with Rule 41(b).